Supreme Court, U.S.
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No. 94-785

In the Supreme Court of the United States

OCTOBER TERM, 1994

JEAN JOSEPH DEEB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the admission at petitioner's trial of the testimony of a co-conspirator from a prior trial comported with Fed. R. Evid. 804(b)(5) and the Confrontation Clause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 13 F.3d 1532.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1994. Pet. App. 29a-30a. A petition for rehearing was denied on August 2, 1994. Pet. App. 27a-28a. The petition for a writ of certiorari was filed on October 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of importing cocaine, in violation of 21 U.S.C. 952(a); one count of conspiring to commit that offense, in violation of 21 U.S.C. 963; two counts of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and one count of conspiring to commit those offenses, in violation of 21 U.S.C. 846.[1] Petitioner was sentenced to 270 months' imprisonment, to be followed by ten years' supervised release. Pet. App. 23a-26a. The court of appeals affirmed. *Id.* at 1a-22a.

1. On August 18, 1988, agents of the U.S. Customs Service boarded a freighter at a shipyard in Miami, Florida. The freighter had just come from Haiti. The only cargo that the agents found on board was a large quantity of cocaine in the ship's ballast tanks. The agents left the cocaine there and set up surveillance of the freighter, assisted by agents of the Drug Enforcement Administration. Pet. App. 2a; Gov't C.A. Br. 3-4.

On August 20, 1988, a van drove up to the freighter, and members of the crew loaded cardboard boxes from the freighter into the van. The agents followed the van to a

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[1] Petitioner was indicted along with six co-defendants. Three of his co-defendants—Gilberto Gomez-Gallego, Francillion Louis Jeune, and Serge Biamby—pleaded guilty before trial. His three other co-defendants were tried separately from petitioner after petitioner failed to appear on the day scheduled for trial. At that trial, co-defendant Abelardo Munera-Cadavid was convicted on the two conspiracy counts and on one count each of importing and possessing with intent to distribute cocaine; co-defendant Ulrisse Loubeau was convicted on one count of possessing with intent to distribute cocaine; and co-defendant Leana Altema was acquitted.

duplex in northwest Miami. Pet. App. 2a; Gov't C.A. Br. 4-5. At the duplex, co-defendants Francillion Louis Jeune and Leana Altema carried the boxes from the van into the house. Petitioner and co-defendant Serge Biamby arrived and then drove off in the van to meet co-defendant Abelardo Munera-Cadavid, who was driving a separate car. The agents stopped the two vehicles and arrested petitioner, Biamby, and Munera-Cadavid. The agents then searched the duplex and found approximately 491 kilograms of cocaine with a retail value of about $32 million. Gov't C.A. Br. 5-6.

2. After petitioner and his co-defendants were indicted, co-defendant Biamby agreed to plead guilty and cooperate with the government. Petitioner and his remaining co-defendants were scheduled to stand trial in July 1989. When petitioner failed to appear on the day of trial, the trial went forward against his co-defendants. At trial, Biamby testified and was cross-examined by the other co-defendants, but petitioner's counsel was not present. Pet. App. 2a-3a.

In February 1990, petitioner was arrested in the Dominican Republic and was returned to Miami for trial. In April 1990, the government moved for, and was later granted, leave to take a videotaped deposition of Biamby because he was terminally ill with AIDS and suffering progressive memory loss. In May 1990, Biamby was deposed; petitioner's lawyer was present at the deposition and questioned Biamby. Pet. App. 3a.

In December 1990, petitioner stood trial. At trial, the government showed the videotaped deposition of Biamby to the jury without objection by petitioner. The government also introduced, over petitioner's objection, Biamby's testimony on direct examination at the 1989 trial of petitioner's co-defendants. Neither side in-

troduced Biamby's testimony on cross-examination at the prior trial. Pet. App. 3a-4a.

3. On appeal, petitioner challenged the admission of Biamby's testimony from the prior trial. The court of appeals rejected that challenge and affirmed petitioner's conviction. Pet. App. 1a-22a.

The court of appeals first considered the admissibility of Biamby's prior testimony under the Federal Rules of Evidence. Pet. App. 4a-12a. The court determined that the prior testimony was not admissible under Fed. R. Evid. 801(d)(1)(B) as a prior consistent statement, "[b]ecause Biamby was not subject [at his deposition] to cross-examination about his former testimony." Pet. App. 6a. The court also determined that the prior testimony was not admissible under Fed. R. Evid. 804(b)(1) as the former testimony of an unavailable witness, because petitioner had not had an opportunity to cross-examine Biamby at the prior trial. Pet. App. 6a-8a.

The court of appeals upheld the admission of Biamby's prior trial testimony, however, under the residual hearsay exception in Fed. R. Evid. 804(b)(5). Pet. App. 8a-12a.[2] The court rejected petitioner's argument that

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[2] Fed. R. Evid. 804(b)(5) provides:

> **(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * * * *
>
> **(5) Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these

the prior testimony was not admissible under Rule 804(b)(5) because it was "specifically covered by," though not admissible under, Rule 804(b)(1). The court observed that petitioner's argument "has been characterized elsewhere as the 'near-miss argument,' which maintains that a hearsay statement that is close to, but that does not fit precisely into[,] a recognized hearsay exception is not admissible under Rule 804(b)(5)." Pet. App. 9a. The court held that petitioner's argument was foreclosed by *United States* v. *Fernandez*, 892 F.2d 976, 981 (1989), cert. dismissed, 495 U.S. 944 (1990), in which the Eleventh Circuit had "rejected the near-miss argument." Pet. App. 9a.

Petitioner's "only other challenge to the admissibility of Biamby's former testimony under Rule 804(b)(5) [was] that it lacked the 'equivalent circumstantial guarantees of trustworthiness' necessary for admission under that exception." Pet. App. 11a. The court of appeals considered that challenge together with petitioner's Confrontation Clause challenge to the admission of the former testimony, noting that, although analysis of the two challenges was "not wholly congruent," it "involved similar factors." *Id.* at 11a-12a. For purposes of its analysis, the court assumed that the evidence was not admissible under "one of the firmly rooted hearsay exceptions." *Id.* at 13a. The court accordingly con-

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rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

sidered whether the evidence bore "particularized guarantees of trustworthiness." *Ibid.* (quoting *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980)).

The court of appeals held that Biamby's prior testimony had the "particularized guarantees of trustworthiness required for admission under the Confrontation Clause." Pet. App. 21a-22a. The court determined that such guarantees were afforded by "the co-defendants' cross-examination of Biamby" at the prior trial. *Id.* at 21a.[3] As an initial matter, the court rejected petitioner's contention that it could not consider the cross-examination of Biamby at the prior trial because it had not been introduced at petitioner's trial (*id.* at 16a):

> [Biamby's] cross-examination was available to [petitioner] who deliberately chose not to introduce it. We cannot allow a defendant to render former testimony inadmissible by the simple expedient of electing not to afford himself of the benefit of cross-examination that occurred when the testimony was taken.

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[3] The court observed that it was "not enough to guarantee * * * trustworthiness" that Biamby had testified under oath at the prior trial. Pet. App. 14a. The court further observed that, "[t]hough self-inculpating, Biamby's testimony was not against his interest because, at the time he testified, Biamby * * * had a strong motive to testify in a manner that would win him favor with the Government." *Ibid.* Noting that this Court "has generally held the uncross-examined statement of an alleged co-conspirator insufficiently trustworthy for admission under the Confrontation Clause," the court of appeals in this case focused on "whether the cross-examination of Biamby" conducted by petitioner's co-defendants at the prior trial, which "was available to [petitioner]" at his own trial, "rendered Biamby's testimony sufficiently trustworthy under the Confrontation Clause." *Id.* at 16a.

Instead, the court stated (*id.* at 17a):

> [W]hen testimony offered under the residual hearsay exception has been subject to cross-examination by someone other than the defendant, that cross-examination serves as the functional equivalent of cross-examination by the defendant if two conditions are met: 1) the cross-examination probed the witness's motive or inducement to lie; and, 2) the defendant has not shown that the absence of an opportunity to personally cross-examine the witness deprived him of an opportunity to present evidence that would have undermined the probative value of the witness's testimony against the defendant.

The court of appeals determined that both conditions were met here. As to the first condition, the court observed that Biamby was "vigorously cross-examined" about his motive to lie by co-defendant Munera-Cadavid. Pet. App. 18a. After setting out part of that cross-examination in the text of its opinion, *id.* at 18a-20a, the court stated that there was "little or nothing [petitioner] could have added to that line of inquiry." *Id.* at 20a. The court then addressed each line of questioning that petitioner claimed he would have pursued in cross-examining Biamby. It determined that "[a]ll of the evidence that [petitioner] sought to establish with the suggested lines of inquiry either was or could have been established through other means." *Id.* at 21a.[4]

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[4] Petitioner contended that he would have cross-examined Biamby about (Pet. App. 21a):

> (1) the legitimate nature of his business relationship with Biamby; (2) inconsistencies between Biamby's former testimony and testimony given by Customs Agent Gonzalez as to the events surrounding [petitioner's] and Biamby's arrest;

ARGUMENT

The court of appeals carefully considered and correctly rejected petitioner's Rule-based and constitutional challenges to the admission of Biamby's prior trial testimony. Moreover, its decision does not conflict with any decision of this Court or another court of appeals. Petitioner's challenge to the decision below presents the same issues that this Court recently declined to review in *Clarke* v. *United States*, 114 S. Ct.

> (3) details of the importation procedure described by Biamby; (4) a statement Biamby allegedly made to [petitioner], after their arrest, that Biamby had told the Government that [petitioner] was innocent; and (5) Biamby's health.

With regard to those lines of questioning, the court of appeals found (Pet. App. 21a):

> First, Biamby admitted at the co-defendants' trial that he had met [petitioner] sometime before [petitioner] allegedly approached him about importing cocaine. Although further inquiry might have elicited testimony from Biamby about the legitimate nature of his business relations with [petitioner], there is no indication that such testimony would have conflicted in any way with Biamby's implication of [petitioner] as a principal in the cocaine importation conspiracy. Further, when [petitioner] had an opportunity at Biamby's deposition to inquire into the legitimate nature of their business relations, he posed no questions regarding those dealings. Second, any inconsistencies between Biamby's and Gonzalez's versions of the events surrounding [petitioner's] and Biamby's arrest was [*sic*] readily apparent. Third, [petitioner] could have discredited Biamby's description of importation procedures through means other than cross-examination of Biamby. Fourth, Biamby's alleged statement that [petitioner] was innocent could likewise be introduced through means other than cross-examination of Biamby. Finally, [petitioner] questioned Biamby extensively about his health at the deposition, which was admitted at trial.

1194 (1994), and *Tucker* v. *United States*, 113 S. Ct. 322 (1992). Further review is likewise unwarranted here.

1. The court of appeals correctly held that Biamby's prior trial testimony was admissible under the residual exception to the hearsay rule in Fed. R. Evid. 804(b)(5). Pet. App. 8a-12a.

Rule 804(b) contains five subsections, Fed. R. Evid. 804(b)(1)-(5), each of which sets forth an exception to the hearsay rule that may apply when a declarant is unavailable. The first four subsections cover specific types of statements: former testimony; statements under belief of impending death; statements against interest; and statements of personal or family history. Fed. R. Evid. 804(b)(1)-(4). The fifth subsection provides that a "statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness" may be admitted if the statement is offered as a material fact, is more probative on the point on which it is offered than other reasonably available evidence, and the general purposes of the Federal Rules of Evidence are served by admission of the statement. Fed. R. Evid. 804(b)(5).

Petitioner argues that Biamby's statements were not admissible under Rule 804(b)(5) because they were "specifically covered by," even though not admissible under, the "foregoing" subsection addressing "former testimony." Nothing in the text of the Rule supports petitioner's "near miss" argument. On the contrary, the most natural reading of the text supports the court of appeals' view in this case that a statement is "specifically covered by" subsections (1) through (4) of Rule 804(b) only if it meets the requirements for admission prescribed in one of those subsections. Pet. App. 9a.

Moreover, the court of appeals' rejection of the "near miss" argument is consistent with the overall purpose of the Rules to further the truth-seeking process. Fed. R. Evid. 102. Under the court of appeals' reading, subsection (5) serves the important purpose of allowing a court, on a case-by-case basis, to admit a statement into evidence, even though it does not fall within one of the first four subsections, if it has sufficient indicia of reliability.[5] By comparison, petitioner's "near miss" argument "would effectively render 804(b)(5) a nullity." *United States* v. *Clarke*, 2 F.3d 81, 83 (4th Cir. 1993), cert. denied, 114 S. Ct. 1194 (1994). More fundamentally, it would thwart the truth-seeking process that the Rules are designed to promote.

Accordingly, the Eleventh Circuit and other circuits have rejected the "near miss" argument. *United States* v. *Clarke*, 2 F.3d at 83; see also, *e.g.*, *United States* v. *Fernandez*, 892 F.2d 976, 981 (11th Cir. 1989), cert. dismissed, 495 U.S. 944 (1990); *United States* v. *Donlon*, 909 F.2d 650, 654 (1st Cir. 1990) ("we do not believe that the 'potential' availability of one kind of hearsay exception automatically rules out the use of another"); *United States* v. *Guinan*, 836 F.2d 350, 354 (7th Cir.), cert. denied, 487 U.S. 1218 (1988); *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 302 (3d Cir. 1983) ("the ['near miss'] theory puts the

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[5] The Senate Committee on the Judiciary explained that, "without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include." S. Rep. No. 1277, 93d Cong., 2d Sess. 19 (1974). The residual exception could not function as such a safety valve if courts were precluded from admitting a statement under that exception whenever the statement was arguably covered by another exception but failed to satisfy its requirements.

federal evidence rules back into the straightjacket from which the residual exceptions were intended to free them"), rev'd on other grounds, 475 U.S. 574 (1986). The court of appeals in this case properly rejected the argument as well.[6]

Petitioner errs in asserting (Pet. 16-18) that the court of appeals' decision gives district courts unduly broad discretion under the residual exception to the hearsay rule. The court of appeals upheld the admission of Biamby's prior testimony on quite narrow grounds. It emphasized that "the mere fact that [Biamby's] statement[s] [were] made under oath [was] not enough to guarantee [their] trustworthiness." Pet. App. 14a. Moreover, it placed little weight on the fact that the prior statements were "self-inculpating." *Ibid.* Instead, the court focused on "whether the cross-examination of Biamby that was available to [petitioner] rendered Biamby's testimony sufficiently trustworthy." *Id.* at 16a. The court identified one co-defendant whose objectives "were sufficiently similar to [petitioner's]

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[6] Petitioner urges this Court to grant review in this case to resolve a conflict among the circuits about the admissibility of grand jury testimony under Rule 804(b)(5). Pet. 14. This Court declined to resolve the asserted conflict in *United States* v. *Tucker*, 956 F.2d 1163 (4th Cir.) (Table), cert. denied, 113 S. Ct. 322 (1992). In any event, this case provides no opportunity to resolve the asserted conflict, because it does not involve the admission of grand jury testimony. Instead, it involves the quite different issue of the admissibility of prior trial testimony that was subject to cross-examination. Compare *United States* v. *Fernandez*, 892 F.2d at 981 (district court erred in admitting grand jury testimony under Rule 804(b)(5), because Eleventh Circuit "has never admitted any grand-jury testimony under the authority of Rule 804(b)(5)") with Pet. App. 15a-16a (distinguishing *Fernandez* on the ground that testimony in the present case was subject to cross-examination).

that his cross-examination could and did probe Biamby's motive or inducement to lie." *Id.* at 18a. The court determined that petitioner could have added "little or nothing * * * to that line of inquiry." *Id.* at 20a. In addition, the court specifically considered each of the lines of questioning that petitioner claimed he would have pursued, and it determined that "[a]ll of the evidence that [petitioner] sought to establish with the suggested lines of inquiry either was or could have been established through other means." *Id.* at 21a. In short, the court of appeals' careful and thorough analysis makes it clear that that court will not permit trial courts to rely on Rule 804(b)(5) indiscriminately.

2. The court of appeals was also correct in holding that the admission of Biamby's prior trial testimony did not violate petitioner's rights under the Confrontation Clause. Pet. App. 12a-22a.

This Court has held that an out-of-court statement by an unavailable declarant may be admitted into evidence without infringing the defendant's rights under the Confrontation Clause if the statement possesses adequate "indicia of reliability." *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980); see *Idaho* v. *Wright*, 497 U.S. 805, 814-815 (1990). Reliability concerns are satisfied, without more, if the statement fits within a "firmly rooted hearsay exception." *Ohio* v. *Roberts*, 448 U.S. at 66; see *White* v. *Illinois*, 112 S. Ct. 736, 743 (1992); *Idaho* v. *Wright*, 497 U.S. at 815. If the statement does not fit within such an exception, it may nevertheless be admitted if the government shows that it carries "particularized guarantees of trustworthiness." *Ohio* v. *Roberts*, 448 U.S. at 66; see *Lee* v. *Illinois*, 476 U.S. 530, 543 (1986). That determination must be made by considering "the totality of the circumstances * * * that surround the making of the statement and that

render the declarant particularly worthy of belief." *Idaho* v. *Wright*, 497 U.S. at 819; *Ohio* v. *Roberts*, 448 U.S. at 65-66. Because the residual hearsay exception is not a "firmly rooted" hearsay exception, a statement admitted under Fed. R. Evid. 804(b)(5) must possess particularized guarantees of trustworthiness to satisfy the Confrontation Clause.

As discussed above, the court of appeals correctly held, after carefully examining the totality of the circumstances, that Biamby's prior testimony bore sufficient guarantees of trustworthiness to satisfy the Confrontation Clause. *Idaho* v. *Wright*, *supra*. That factbound determination does not warrant further review.

Petitioner's reliance (Pet. i-ii, 11, 14, 22) on *Coy* v. *Iowa*, 487 U.S. 1012 (1988), is misplaced. The defendant in that case was charged with sexually assaulting two 13-year-old girls. *Id.* at 1014. At trial, the two girls testified behind a screen that kept the defendant from fully seeing them. *Id.* at 1014-1015. The Court held that that procedure violated the Confrontation Clause. *Id.* at 1020-1022. The Court did not, however, address the quite different situation presented here: *i.e.*, the admission under the residual hearsay exception of the testimony of an unavailable declarant from a prior trial. Cf. *White* v. *Illinois*, 112 S. Ct. at 743-744 (distinguishing the in-court procedural issues addressed in *Coy* from the requirements for admitting an out-of-court declaration under the Confrontation Clause). To the extent that petitioner relies on *Coy* to assert a right physically to confront Biamby at trial, he cannot establish that he was deprived of that right. Petitioner, like his co-defendants, had an opportunity to confront Biamby at the trial scheduled for July 1989. Petitioner, however, chose to forgo that opportunity by deliberately failing to appear for the trial.

Petitioner's reliance (Pet. 11, 13, 19, 22) on *Williamson* v. *United States*, 114 S. Ct. 2431 (1994), is likewise misplaced. In *Williamson*, this Court "clarif[ied] the scope" of Rule 804(b)(3), which permits the admission of statements against interest. *Id.* at 2433. The Court held that Rule 804(b)(3) required a "fact-intensive inquiry" to determine whether each portion of the statements by an accomplice of the defendant "was truly self-inculpatory." *Id.* at 2437 (opinion of O'Connor, J.). The Court noted, however, that if the accomplice's statements did not meet the requirements of Rule 804(b)(3), they might still be admissible under the residual exception of Rule 804(b)(5). *Id.* at 2437 n.*. Thus, nothing in *Williamson* casts doubt on the correctness of the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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